

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DONALD GUFFEY)	
Claimant)	
VS.)	
)	
MIDWEST TITAN, INC.)	Docket Nos. 220,304
ZIMMERMAN CONSTRUCTION COMPANY, INC.)	and 220,305
Respondents)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
TRAVELERS INSURANCE COMPANY)	
CGU/HAWKEYE SECURITY INSURANCE CO.)	
Insurance Carriers)	

ORDER

Claimant, respondent Midwest Titan, Inc. (Titan) and respondent Zimmerman Construction Company, Inc. (Zimmerman) appeal the March 7, 2000, Award of Administrative Law Judge Robert H. Foerschler. Claimant was awarded a 48.25 percent permanent partial work disability against respondent Titan and a 45 percent permanent partial disability against respondent Zimmerman and its insurance companies Travelers Insurance and CGU/Hawkeye Security Insurance. Oral argument before the Board was held on October 4, 2000.

APPEARANCES

Claimant appeared by his attorney, Leah Brown Burkhead of Mission, Kansas. Respondent Titan and its insurance carrier Liberty Mutual Insurance Company appeared by their attorney, James K. Blickhan of Overland Park, Kansas. Respondent Zimmerman and its insurance carrier Travelers Insurance Company appeared by their attorney John R. Emerson of Kansas City, Kansas. Respondent Zimmerman and its insurance carrier CGU/Hawkeye Security Insurance Company appeared by their attorney S. Margene Burnett of Kansas City, Missouri. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations contained in the Award of the Administrative Law Judge.

The Appeals Board acknowledges the March 13, 2000, Memorandum from Administrative Law Judge Foerschler, noting that, in the Award against Zimmerman, temporary total disability compensation of 15 weeks was not deducted from the Award before applying the percentage of work disability. Judge Foerschler noted that this would increase the claimant's total award to \$20,092.39, an increase of \$2,810.10. However, the Administrative Law Judge did not prepare a nunc pro tunc order which, in his Memorandum, he indicated would not be effective. This miscalculation will be corrected by the Board during the calculation of the award and the computation of the amount of compensation due.

ISSUES

DOCKET NO. 220,305 (TITAN)

- (1) Did claimant suffer accidental injury on the date or dates alleged?
- (2) Did claimant's accidental injury or injuries arise out of and in the course of his employment with respondent?
- (3) What is claimant's average weekly wage on the alleged date of accident?
- (4) Does respondent have liability under the Kansas Workers Compensation Act?
- (5) Is claimant entitled to past and future medical treatment?
- (6) Is claimant entitled to unauthorized medical care?
- (7) What is the appropriate calculation of the award and the amount of compensation due and owing?
- (8) What is the nature and extent of claimant's disability?

DOCKET NO. 220,304 (ZIMMERMAN)

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment with Zimmerman Construction Company during the time Travelers Insurance Company provided workers compensation coverage?
- (2) Is claimant entitled to additional temporary total disability compensation during the periods January 7, 1997, through

February 23, 1997 (6.86 weeks), and November 3, 1998, through December 30, 1998 (8.29 weeks)?

- (3) What is claimant's average weekly wage while he was employed with Zimmerman Construction?
- (4) Is claimant entitled to reimbursement for out-of-pocket medical expenses in the amount of \$2,855.36 and medical mileage of 3,200 miles?
- (5) Is claimant entitled to reimbursement of medical expenses paid by claimant's wife's group health carrier?
- (6) What is the appropriate calculation of the work disability award?
- (7) What is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant is a carpenter. He first began working for respondent Titan in the mid 1980s. His job as a carpenter required substantial upper extremity repetitive activities. In the Spring of 1995, claimant began noticing symptoms in his hands and elbows. Claimant's duties required he use numerous vibratory tools, including various drills, and that he hammer, lift and saw repetitively.

Claimant reported his problems to Tom at Titan in April 1995. He first sought treatment with his chiropractor, Ronald Wilds, D.C., and was referred by Dr. Wilds to Truett L. Swaim, M.D., a board certified orthopedic surgeon. Dr. Swaim initially treated claimant conservatively and ordered EMGs on claimant's bilateral upper extremities. Claimant was diagnosed with moderately severe right carpal tunnel syndrome and early left carpal tunnel syndrome. Claimant also had Guyon canal syndrome and bilateral epicondylitis. Dr. Swaim recommended claimant undergo bilateral carpal tunnel releases, bilateral Guyon canal releases and bilateral epicondyle releases. Claimant elected to forego the surgeries. It is noted that the medical treatment being provided was through claimant's own doctors. He had requested medical treatment through Titan, but no medical treatment was forthcoming. He was, therefore, forced to seek medical treatment on his own.

Claimant continued working for Titan as a carpenter through November 5, 1995. At that time, the bulk of Titan's work had concluded. The only work remaining involved the construction of forms, which claimant described as being very heavy work. Claimant advised Titan that he would be unable to perform that type of heavy labor, considering the condition of his hands. He then requested that he be laid off by Titan. That request was granted, with claimant's last day of work being November 5, 1995.

After leaving Titan, claimant contacted Zimmerman. At the time of his hire with Zimmerman on December 28, 1995, claimant advised Zimmerman's owner of his upper extremity difficulties. Zimmerman agreed, if possible, to accommodate claimant's limitations.

Claimant noted during the period of time between his layoff at Titan and his start of work with Zimmerman, his upper extremities did improve somewhat.

Claimant's duties at Zimmerman also involved carpentry work, including sawing, drilling and lifting. Claimant acknowledged the duties were similar to what he had done at Titan, but the work at Zimmerman was substantially less difficult as Zimmerman's work for the most part was interior work which did not require the amount of stress or heavy labor required at Titan.

Claimant performed his duties at Zimmerman with difficulty. Claimant testified that his upper extremities, after improving during his period of reduced activity, began to get worse at Zimmerman. Claimant's work at Zimmerman appeared to be full time, although it is acknowledged claimant rarely worked a 40-hour week.

As claimant's symptoms grew worse, he notified Zimmerman that he would be seeking additional medical treatment. No treatment was provided through Zimmerman. Claimant's last day working for Zimmerman prior to his surgery was September 29, 1996, when claimant returned to Dr. Swaim. Claimant's right upper extremity conditions had remained basically the same as when he left Titan, but the carpal tunnel syndrome in his left had worsened. Dr. Swaim again recommended that claimant undergo surgery. This time claimant agreed.

Surgery was performed on claimant's left upper extremity on October 1, 1996. Dr. Swaim returned claimant to work on January 7, 1997. However, during this time, claimant was suffering from kidney stones. The medical records of claimant's treating physician, Dr. Steve Gialde, indicate claimant was hospitalized at some time during this period for the kidney stones. However, Dr. Gialde's deposition was not taken and the exact dates of claimant's hospitalization are unknown.

Claimant underwent surgery for his right upper extremity difficulties on February 25, 1997. Claimant was returned to work with Zimmerman on May 19, 1997, and continued working for Zimmerman until March 29, 1998. Claimant's work with Zimmerman, after his return in May of 1997, was supposed to have been lighter work. Claimant was promised helpers to assist with the heavy lifting. However, this did not always work out because the helpers did not always show up for work and claimant would then be responsible for unloading truckloads of materials. Claimant testified the work he performed from May 1997 through March 1998 was the same type of work as he had performed prior to his surgery. Claimant's hands and elbows again started hurting, and he experienced swelling. Claimant testified his condition regressed back to the pre-surgery level.

Claimant advised Zimmerman he would be terminating his employment, with his last day worked being March 29, 1998. Sometime after the termination, claimant was advised by the owner of Zimmerman that he would have a job available for him at a comparable wage in a supervisory position. Claimant testified, however, the position they were offering was the same position he had worked in the past, only with more supervision. Claimant also testified he would still be required to perform the physical labor of a carpenter. Claimant felt he would be physically unable to perform those duties and rejected the offer. Claimant also began suffering from depression during this period of time, and testified his ongoing depression contributed to his inability to return to work at Zimmerman.

Claimant did testify, if the position at Zimmerman had been a true supervisory position, he felt he could perform the duties once he overcame the depression. However, he expressed concern about the actual requirements of the job involving more carpentry work than he felt he was able to perform.

After leaving Zimmerman, claimant was unemployed for a period of several months, but ultimately obtained a job with the El Dorado Springs, Missouri, school district, performing general maintenance.

While working for Titan, claimant was paid \$22.05 an hour with some overtime. While working for Zimmerman, claimant was paid \$20 an hour with some overtime. Claimant's position with El Dorado Springs paid \$7 per hour. Claimant described the job at El Dorado Springs school district as a much slower paced job than the construction jobs. He still experiences problems during the day with his arms, as he is required on a fairly regular basis to use hand tools. However, he is able to work at a slower rate and, thus, can perform the duties of a maintenance worker for the school district.

The burden of proof is on claimant to establish his right to an award of compensation by proving the various conditions upon which that right depends by a preponderance of the credible evidence, K.S.A. 1997 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g). Claimant's description of his activities with both Titan and Zimmerman and the difficulties he developed while performing those jobs is uncontradicted. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). In this instance, the Board finds claimant suffered accidental injury arising out of and in the course of his employment with both Titan and Zimmerman.

The appropriate date of accident applicable to a microtrauma injury, as was suffered by claimant during his employments with both Titan and Zimmerman, has long been the subject of litigation in Kansas. The Kansas appellate courts have attempted, on several occasions, to establish rules by which the appropriate date of injury or accident may be determined. Beginning with Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), and continuing through Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999), the Kansas appellate courts have addressed the issue of date

of accident when dealing with repetitive trauma injuries. The Supreme Court, in Treaster, considered not only the time when an employee may no longer perform his or her duties, but also the time of onset of pain which necessitates medical treatment and the time when the employee first becomes aware of the injury and its relationship to the job when establishing an accident date. The Supreme Court held that the Berry logic should not be limited to situations where a claimant is forced to discontinue his or her employment for medical reasons. The Court went on to state:

If an accommodated position is offered and accepted that is not substantially the same as the previous position that claimant occupied, the Berry rule should be applied. The date of accident or occurrence will be the last day the claimant performed the earlier work tasks. This rule disregards attempts by either claimants or respondents to move a date of accident or occurrence to before or after an advantageous time for purely monetary or coverage reasons. *Id.* at 624.

Here, claimant was not offered an accommodated position with Titan. Claimant continued performing the same duties and responsibilities he had throughout his employment through the last day worked of November 5, 1995. The Appeals Board finds that claimant's date of accident at Titan will be November 5, 1995, pursuant to the logic of Berry and Treaster.

Claimant began working for Zimmerman with the understanding that he had ongoing upper extremity difficulties. Zimmerman's owner acknowledged that he would provide assistance to claimant when performing the heavier work. However, claimant continued experiencing difficulties and his condition worsened which led to the bilateral upper extremity surgeries. While it could be argued that claimant's date of accident should be September 29, 1996, the last day worked before undergoing the surgeries, the Board finds that date would not be appropriate under these circumstances.

The parties, when arguing the appropriate date of accident, ignore the evidence that claimant's condition grew worse after the surgeries and after he returned to work for Zimmerman, performing the same basic duties which led to his initial problems. Claimant's last day worked for Zimmerman was March 29, 1998. Again, pursuant to the logic of Berry and Treaster, the Appeals Board finds claimant's date of accident in Docket No. 220,304 while working for Zimmerman to be March 29, 1998.

With regard to the average weekly wage of claimant, the Appeals Board finds claimant, while working for Titan, was paid \$22.05 an hour and earned \$44.71 per week average overtime. This would equate to an average weekly wage of \$926.71 per week with Titan. ($\$22.05 \times 40 = \$882.00 + \$44.71 = \926.71 .) The evidence also supports a finding that claimant worked for Zimmerman at \$20 per hour. There was a dispute regarding whether claimant worked full time or part time for Zimmerman. While the Administrative Law Judge does not specifically address this issue, he did find that

claimant's average weekly wage at Zimmerman to be \$613.53 which would necessitate a finding on the Administrative Law Judge's part that claimant was a part-time worker.

K.S.A. 44-511(a)(4) (1993 Furse) defines a "part-time hourly employee" as an employee paid on a regular basis,

(A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.

K.S.A. 44-511(a) (1993 Furse) defines a "full-time hourly employee" as follows:

(5) The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.

K.S.A. 44-511 (1993 Furse) goes on to dictate the method of computing an average weekly wage where the employee is paid by the hour and is considered either a full-time or a part-time employee. In this instance, the Appeals Board finds there was no limit placed upon the number of hours claimant was expected to work when he became employed with Zimmerman. Even though there is an indication that claimant rarely worked 40 hours per week, there is also no indication in the record that claimant was hired as a part-time employee. The Appeals Board finds claimant was a full-time employee while working for Zimmerman. His average weekly wage, therefore, computed pursuant to K.S.A. 44-511 (1993 Furse), shall be \$20 per hour times 40 hours per week or \$800 per week plus overtime in the amount of \$27.50 per week for a total of \$827.50.

With regard to the nature and extent of claimant's injuries and/or disabilities, the Appeals Board will first consider what, if any, functional impairment claimant suffered as a result of his injuries. P. Brent Koprivica, M.D., examined claimant on July 25, 1997, seeing him only on one occasion. Dr. Koprivica found claimant had a 25 percent impairment to the body as a whole as a result of the injuries to his bilateral upper extremities based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. Dr. Koprivica did not have the opportunity to examine claimant after he returned to work for Zimmerman and after his condition worsened through his last day

worked of March 29, 1998. Dr. Swaim, claimant's treating physician, also assessed claimant a functional impairment, finding claimant had suffered a 20 percent impairment to the body as a whole for his bilateral upper extremity conditions. This opinion was also based upon the AMA Guides, Fourth Edition.

The Appeals Board, in considering the testimony of the doctors, finds the opinion of Dr. Swaim to be the more credible as Dr. Swaim did have the opportunity to examine claimant after claimant's last day with Zimmerman, March 29, 1998. The Appeals Board, therefore, finds claimant has a 20 percent impairment to the body as a whole as a result of his bilateral upper extremity injuries suffered while working as a carpenter.

Both Dr. Swaim and Dr. Koprivica speculated that 75 percent of claimant's impairment was secondary to his employment at Titan, with the other 25 percent being related to the work he performed for Zimmerman. Neither doctor, however, testified that this apportionment was given pursuant to the AMA Guides, Fourth Edition. The Appeals Board is unwilling to accept the speculation provided by the doctors in this regard and finds claimant had a 20 percent impairment to the body as a whole after leaving Zimmerman. The Appeals Board finds claimant has failed to prove what, if any, functional impairment is attributable to his condition with Titan.

With regard to what, if any, work disability claimant would be entitled to, K.S.A. 1997 Supp. 44-510e states,

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

While working for Titan, claimant was earning \$926.71 as an average weekly wage. Claimant left Titan and went to work almost immediately at Zimmerman, earning \$827.50 per week, resulting in an 11 percent loss of wages. The Appeals Board finds, for the purposes of K.S.A. 1997 Supp. 44-510e, claimant has suffered a wage loss of 11 percent.

Both Dr. Swaim and Dr. Koprivica provided testimony with regard to the claimant's loss of task performing ability. Dr. Koprivica, in considering the task loss opinion of Michael Dreiling, found claimant had lost the ability to perform two tasks, specifically tasks one and two, as a result of claimant's work at Titan. Those tasks, both of which required heavy labor, were not required at Zimmerman.

The Administrative Law Judge, in the Award, questioned Dr. Koprivica's opinion that claimant had performed eighteen different tasks over the 15 years preceding his injury. While it is true as noted in the Award that Mr. Dreiling identified sixteen tasks in his report, it is also true that during Mr. Dreiling's deposition he added two additional tasks. That raised the total number of tasks to eighteen. When considering that claimant lost the ability to perform two of those tasks while working for Titan, the Appeals Board finds claimant suffered a task loss of 11 percent as a result of the injury suffered for Titan.

Therefore, in utilizing the work disability computation method set forth in K.S.A. 44-510e (1993 Furse), the Appeals Board finds claimant has suffered an 11 percent permanent partial disability to the body as whole as a result of the injuries suffered while employed with Titan. As stated above, claimant has failed to prove the extent of his functional impairment suffered from the injuries sustained at Titan.

After leaving Zimmerman, claimant was unemployed for a period of several months. During that period, he was being treated by Jim H. Lemons, Ed.D., a psychologist and the director of a pain behavior management program in Overland Park, Kansas. Dr. Lemons' treatment was for the chronic pain syndrome and resulting depressive reaction from the claimant's bilateral upper extremity injuries.

Dr. Lemons' program necessitated that claimant be involved in pain management several hours per day. Claimant was driving from El Dorado Springs to Overland Park, Kansas. The Appeals Board finds it was not feasible at that time for claimant to be employed. During this period from November 3, 1998, through December 30, 1998, claimant was undergoing pain management treatment for his ongoing pain and depression, and was unable to work. The Appeals Board, therefore, finds claimant was temporarily and totally disabled during this period.

As a result of the treatment provided by Dr. Lemons, claimant was returned to the work force and was able to continue his employment with the El Dorado Springs school district.

While employed with the El Dorado Springs school district, claimant was earning \$7 per hour and working 40 hours per week. This results in an average weekly wage of \$280 per week.

The Administrative Law Judge in the Award, rather than considering the actual wage claimant was earning, post injury, imputed to claimant an average weekly wage of \$440 per week. This was pursuant to the testimony of Mr. Dreiling, who opined claimant would be capable of earning in the range of \$11.23 per hour had he not chosen to live in rural Missouri.

K.S.A. 1997 Supp. 44-510e mandates a consideration of the difference between the average weekly wage the worker was earning at the time of the injury and the average

weekly wage the worker is earning after the injury. This computation, however, must be considered in the context of respondent's allegation that claimant violated the principles set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), and Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

In Foulk, the Kansas Court of Appeals held that the Workers Compensation Act should not be construed to award benefits to a worker solely for refusing a proper job that the worker had the ability to perform.

In Copeland, the Kansas Court of Appeals held that, if a claimant, post injury, does not put forth a good faith effort to obtain employment, then the trier of fact is obligated to impute a wage based upon the evidence in the record as to claimant's wage earning ability.

The Appeals Board finds neither the principles of Foulk nor the principles of Copeland to apply in this instance. It is acknowledged that claimant was offered a position with Zimmerman as a supervisor. However, claimant's testimony is uncontradicted that the supervisory position which was offered would involve substantial activities as a carpenter. The history of these two cases displays claimant's inability to perform those activities. Had there been testimony from respondent that the offer would have included only supervisory activities and would not have included the repetitive upper extremity activities necessitated by the carpenter's job, a different result might have been reached. However, that testimony was not presented. Therefore, claimant's uncontradicted testimony that he was physically unable to perform the supervisory job because it involved substantial upper extremity carpentry activities is uncontradicted and is accepted by the Board. The Appeals Board, therefore, finds claimant did not violate the principles set forth in Foulk when he refused the supervisor's job with Zimmerman.

Additionally, after leaving respondent, claimant obtained employment with the El Dorado Springs school district. While this job pays substantially less than what he was earning for both Titan and Zimmerman, claimant has proven an inability to continue as a carpenter due to his upper extremity injuries. The Appeals Board does not find, under the principles set forth in Copeland, that claimant's post-injury job search was not in good faith. Therefore, rather than imputing a wage under K.S.A. 1997 Supp. 44-510e, the Appeals Board will use the actual wages being earned by claimant with the El Dorado Springs school district. In comparing claimant's average weekly wage of \$827.50 to the wage he was earning at the school district of \$280 per week, the Appeals Board finds claimant has suffered a 66 percent loss of wages pursuant to K.S.A. 1997 Supp. 44-510e.

In considering claimant's loss of task performing abilities, the Appeals Board again adopts the opinion of Dr. Koprivica. Michael Dreiling provided a list of eighteen tasks which claimant had performed over the 15 years preceding his accident. Of those eighteen tasks, claimant was no longer able to perform sixteen of the eighteen, pursuant to the

testimony of Dr. Koprivica. The Appeals Board, therefore, finds claimant has suffered an 89 percent loss of task performing abilities as a result of his upper extremity injuries.

The Appeals Board acknowledges that a task loss opinion involving the task list of Gary Weimholt was discussed during the deposition of Dr. Swaim. Dr. Swaim even went so far as to adopt Mr. Weimholt's opinion that claimant had lost 57 percent of his ability to perform tasks. However, Dr. Swaim also testified that it was not his area of expertise to discuss task loss opinions and it was difficult for him to give an opinion. He acknowledged any number that he would provide would be speculation. He ultimately testified that claimant was definitely making less money now than he was while working at Titan. This indicates to the Appeals Board that Dr. Swaim's understanding of work tasks and task loss did not rise to the level of credible evidence.

In computing claimant's work disability as a result of his employment with Zimmerman, the Appeals Board finds that a 66 percent loss of wage earning ability, when averaged with an 89 percent loss of task performing ability, results in a 77.5 percent permanent partial disability to the body as a whole.

In computing the award, the Appeals Board notes the stipulation by the parties that, for the October 1995 accident, claimant was entitled to the maximum rate of \$326 per week, and with regard to the October 1996 date of accident, claimant was entitled to the maximum rate of \$338 per week. However, claimant's brief of April 28, 2000, notes that in Docket No. 220,304, involving Zimmerman, the Administrative Law Judge found claimant met with personal injury by accident through September 29, 1996, the last date claimant worked for that employer. September 29, 1996, was not the last day claimant worked for Zimmerman. That misunderstanding has continued throughout this entire matter. While claimant did leave his employment with Zimmerman after September 29, 1996, to obtain medical treatment, claimant did return to work for Zimmerman and remained in Zimmerman's employment until March 29, 1998. This is the last date of employment with Zimmerman and the date of accident found by the Board. The Appeals Board, therefore, finds that the stipulation by the parties as to the maximum weekly rate applicable in this case is grounded on a misunderstanding of the appropriate date of accident. The Appeals Board finds, for a date of accident of March 29, 1998, the appropriate maximum compensation rate would be \$351 per week.

With regard to claimant's entitlement to temporary total disability compensation, the Board has already found claimant was temporarily disabled as a result of his injuries suffered with Zimmerman for the period November 3, 1998, through December 30, 1998.

Claimant, however, contends entitlement to additional temporary total disability compensation for the period January 7, 1997, through February 23, 1997. Dr. Swaim, claimant's treating physician, had released claimant to return to work as of January 6, 1997. The record contains evidence that claimant suffered kidney stones and was

hospitalized for that condition sometime during this period. However, the medical records do not clarify exactly when claimant was hospitalized or for how long.

In workers compensation litigation, it is claimant's burden to prove his entitlement to the benefits alleged by a preponderance of the credible evidence. The Appeals Board finds claimant has failed to prove entitlement to temporary total disability compensation during the January 7, 1997, through February 23, 1997, period, and those benefits are denied.

Claimant alleges entitlement to medical treatment and reimbursement of medical costs expended for the injuries suffered with both Titan and Zimmerman.

K.S.A. 1997 Supp. 44-510 makes it the duty of the employer "to provide the services of a health care provider, and such medical, surgical and hospital treatment . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury."

Both Titan and Zimmerman were advised of claimant's ongoing problems. Neither elected to provide claimant with medical treatment, and claimant was forced to seek medical treatment, on his own, through his wife's health care insurance provider.

When an employer neglects to provide medical care and an injured worker pays for the medical care himself, the worker may recover compensation thereafter, even if he has recovered from another source. Babcock v. Dose, 178 Kan. 700, 290 P.2d 1046 (1955). When an employer is held to have "neglected to reasonably provide" medical benefits, the employer is liable for the medical care procured by the claimant. Cross v. Wichita Compressed Steel Co., 187 Kan. 344, 356 P.2d 804 (1960).

In this instance, claimant advised both Titan and Zimmerman of his ongoing problems, and both neglected to provide medical care. The Appeals Board, therefore, finds claimant is entitled to be reimbursed and to recover for the medical expenses expended on his behalf.

The Administrative Law Judge awarded claimant reimbursement for his own medical care totaling \$1,921.20. There is no explanation in the Award as to how that sum was computed. However, Claimant's Exhibit 14, attached to the continued regular hearing transcript of July 6, 1999, details medical expenses which are listed as the patient's responsibility. Claimant, in his brief of April 28, 2000, argues entitlement to out-of-pocket medical expenses in the amount of \$2,585.36. Claimant's Exhibit 14 to the July 6, 1999, regular hearing supports claimant's contention, and the Appeals Board modifies the award and grants claimant reimbursement for out-of-pocket medical expenses in the amount of \$2,585.36.

Claimant further alleges entitlement to reimbursement for medical mileage totaling 3,200 miles. In claimant's request for medical mileage reimbursement, claimant cites the

regular hearing transcript of July 21, 1998, Claimant's Exhibit 9, and the regular hearing transcript, III, of July 6, 1999, Claimant's Exhibit 13.

In reviewing the exhibits, the Appeals Board finds claimant entitled to 640 miles in mileage for the treatment provided by Dr. Swaim and an additional 2,520 miles for the treatment provided by Dr. Lemons.

While respondent contends and the Administrative Law Judge found claimant's treatment by Dr. Lemons and the mileage involved resulted from claimant's desire to live outside of the metropolitan Kansas City area, the Appeals Board does not believe the law is so restrictive. Claimant's relocation to El Dorado Springs, Missouri, was for the purpose of accepting employment with the El Dorado Springs school district. The Appeals Board finds that move, under the circumstances, was proper and the mileage necessitated by claimant's continued treatment with Dr. Lemons for management of his ongoing depression and pain to be appropriate under K.S.A. 1997 Supp. 44-510. Therefore, for the treatment with Dr. Swaim, claimant is awarded 64 miles at \$.29 per mile totaling \$18.56, 512 miles at \$.30 per mile totaling \$153.60 and 66 miles at \$.31 per mile totaling \$20.46, for a total of \$192.62. Reimbursement for the July 25, 1997, trip to Dr. Koprivica in the amount of 38 miles is rejected, as that was for the purpose of obtaining an impairment rating. That would not be considered as medical treatment under K.S.A. 1997 Supp. 44-510, and the mileage would not be appropriate. Additionally, the Appeals Board awards claimant 2,520 miles for the trips to Dr. Lemons at \$.32 per mile totaling \$806.40, for a total of \$999.02 in medical mileage reimbursement.

Claimant also alleges entitlement to unauthorized medical treatment. The Appeals Board finds claimant is entitled to unauthorized medical treatment pursuant to K.S.A. 1997 Supp. 44-510 up the statutory maximum of \$500 per accident upon presentation of an itemized statement verifying same. The Appeals Board, however, rejects any unauthorized medical payments for the evaluation performed by Dr. Koprivica. Dr. Koprivica's examination was for the purpose of obtaining a functional impairment rating, which would be in violation of K.S.A. 1997 Supp. 44-510(c)(2), and unauthorized medical would be inappropriate under those circumstances.

In Docket No. 220,305, the work disability resulting from claimant's employment with Titan for an 11 percent whole body permanent partial disability computes to 45.65 weeks permanent partial disability compensation times the applicable rate of \$326 per week totaling \$14,881.90.

As claimant failed to prove what, if any, portion of his functional impairment was related to Titan, claimant's award is based upon his work disability under K.S.A. 1997 Supp. 44-510e. Additionally, it is noted claimant was paid no temporary total disability compensation and claimed none against Titan.

In Docket No. 220,304, the total temporary total and permanent partial disability resulting from claimant's employment with Zimmerman is computed as follows. Claimant was previously paid 25.29 weeks temporary total disability compensation at the rate of \$338 per week. The Appeals Board first finds with the date of accident of March 29, 1998, the applicable weekly rate should be \$351 per week. There was, therefore, an underpayment of \$13 per week for 25.29 weeks totaling \$328.77 which is ordered paid as part of this award.

Claimant is entitled to an additional 8.29 weeks of temporary total disability compensation for the period of time he was being treated by Dr. Lemons for pain management and his ongoing depression. Claimant is, therefore, entitled to a total of 33.58 weeks temporary total disability compensation at the rate of \$351 per week totaling \$11,786.58. Thereafter, claimant is entitled to an award based upon a wage loss of 66 percent and a task loss of 89 percent for a permanent partial disability of 77.5 percent permanent partial disability to the body as a whole. In computing the award, the Appeals Board acknowledges the Memorandum of the Administrative Law Judge noting the failure to deduct the 15 weeks temporary total disability compensation pursuant to K.S.A. 1997 Supp. 44-510e. This deduction was applied in the Board's computation.

Claimant is entitled to 307.23 weeks permanent partial disability compensation at the rate of \$351 per week which exceeds the \$100,000 maximum liability set forth in K.S.A. 44-510f (1993 Furse). Claimant would, therefore, be entitled to 33.58 weeks temporary total disability compensation at the rate of \$351 per week totaling \$11,786.58, followed thereafter by compensation at the rate of \$351 per week until claimant has been paid a total of \$100,000 for the injuries suffered through March 29, 1998.

Respondent Zimmerman contends it is entitled to a reduction in claimant's award pursuant to K.S.A. 44-510a (1993 Furse) for a credit for any weeks which may be overlapping from these awards. The Administrative Law Judge in computing the award granted respondent Zimmerman a credit for overlapping weeks. However, with the modification in claimant's award and the modification in dates of accident, the Appeals Board finds there are no weeks overlapping for which a credit would be due under K.S.A. 44-510a (1993 Furse).

Respondent Zimmerman further alleges entitlement to a credit under K.S.A. 1997 Supp. 44-501(c) for the amount of functional impairment determined to be preexisting. As noted above, the Appeals Board found claimant had failed to prove the percentage of functional impairment attributable to the injuries suffered while employed with Titan. Respondent Zimmerman likewise failed to prove the percent of functional impairment to be used for the K.S.A. 1997 Supp. 44-501(c) credit. See Hanson v. Logan U.S.D. 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* ___ Kan. ___ (2001). There is, therefore, no functional impairment which has been proven to be preexisting claimant's

employment with Zimmerman. Therefore, a reduction under K.S.A. 1997 Supp. 44-501(c) is also not appropriate.

AWARD

DOCKET NO. 220,305 (TITAN)

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated March 7, 2000, should be, and is hereby, modified, and claimant, Donald Guffey, is granted an award against Midwest Titan, Inc., and Liberty Mutual Insurance Company, for an injury occurring on November 5, 1995, based upon an 11 percent impairment to the body as a whole and an average weekly wage of \$926.71. Claimant is awarded 45.65 weeks permanent partial disability compensation at the rate of \$326 per week totaling \$14,881.90. As of the time of this award, the entire amount is due and owing in one lump sum, minus any amounts previously paid.

Claimant is further awarded all authorized medical treatment through December 27, 1995, the last day before he began working for Zimmerman Construction Company.

Further, claimant is entitled to unauthorized medical up to the statutory maximum upon presentation of an itemized statement verifying same, with the qualification that Dr. Koprivica's medical examination and impairment rating does not qualify for purposes of unauthorized medical treatment under K.S.A. 44-510(c) (1993 Furse).

Claimant is further awarded future medical treatment upon application to and approval by the Director.

DOCKET NO. 220,304 (ZIMMERMAN)

WHEREFORE, it is the finding, decision, and order of the Appeals Board that an award is granted in favor of the claimant, Donald Guffey, and against respondent Zimmerman Construction Company, Inc., and CGU/Hawkeye Security Insurance Company, for an injury occurring through March 29, 1998, for a 77.5 percent permanent partial disability to the body as a whole for the injuries suffered.

Claimant is entitled to 33.58 weeks temporary total disability compensation at the rate of \$351 per week totaling \$11,786.58, followed thereafter by 251.32 weeks permanent partial disability compensation at the rate of \$351 per week in the amount of \$88,213.42 until claimant reaches the statutory maximum award of \$100,000.

Claimant is further awarded future medical treatment upon proper application to and approval by the Director.

Unauthorized medical expense in the amount of \$500 is awarded to claimant upon presentation of an itemized statement verifying same, with the qualification that the medical examination and opinion provided by Dr. Koprivica does not qualify pursuant to the findings contained within this award.

Claimant is further awarded out-of-pocket medical expense reimbursement and medical mileage pursuant to the terms of this award.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of June 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Leah Brown Burkhead, Mission, KS
James K. Blickhan, Overland Park, KS
S. Margene Burnett, Kansas City, MO
John R. Emerson, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director